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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JERRY WORTHY, Petitioner/Appellant, v. IRIS WORTHY, Respondent/Appellee.	2 CA-CV 2008-0083 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D-20064251

Honorable Kenneth Lee, Judge

AFFIRMED

Curtis & Cunningham
By Marjorie Fisher Cunningham
Tucson
Attorneys for Petitioner/Appellant

Iris Worthy
Tucson
In Propria Persona

E S P I N O S A, Judge.

¶1 In this appeal, Jerry Worthy challenges the trial court's order granting spousal maintenance to his former wife, Iris Worthy. He contends the court abused its discretion in determining the duration and amount of Iris's spousal maintenance award. We affirm.

Factual and Procedural Background

¶2 Jerry and Iris were married in 1991. In December 2007, when the court entered its decree of dissolution of their marriage, Jerry was forty-seven and Iris was fifty-six years old. No children were born during the marriage. Since 1992, Jerry has owned his own mobile automobile-repair business, Worthy Services, Inc. ("Worthy Services"). Jerry has been in total control of the business and the family finances.

¶3 As part of the dissolution proceeding, Jerry hired a business evaluator to evaluate Worthy Services. According to the evaluator, Jerry earned an average net income of $27,000 each year from 2004 to 2006. The evaluation report reflects that, since 2004, Worthy Services has had gross sales of $60,000 per year. The total sales figure includes both Jerry's labor and the markup he charges on most of the parts he purchases for jobs. Jerry testified he charged $65 per hour for labor and does not charge for his travel time. He further testified he usually has five "good" months a year, five months that are slow, and two months that are "a little bit slower" than his good months. During the slow months, Jerry estimated, he averaged twenty labor hours per week and ten hours of driving time.

¶4 Iris graduated from high school in England and later moved to the United States in the late 1980s or early 1990s. By agreement between the parties, Iris has not worked outside the home since 1992. She has several disabilities, including Dupuytren's

disease in both hands, which causes her fingers to contract into her palms, rendering them unusable. She can use only three fingers on her right hand and cannot use her left hand. She has already had one unsuccessful surgery on her left hand, and her physician is recommending future surgeries for both hands. She also has asthma, has been diagnosed with depression, and has received counseling for post-traumatic stress disorder.

¶5 The court found that Iris qualified for spousal maintenance and awarded her $2,225 per month for life or until she remarries. Jerry filed a motion for a new trial, which the trial court denied. This court has jurisdiction over Jerry's appeal from the decree of dissolution pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(B).

Discussion

¶6 Jerry does not dispute that Iris is entitled to an award of spousal maintenance but argues the trial court abused its discretion in awarding maintenance until her death or remarriage instead of for a specified duration. He also contends the court abused its discretion in determining the amount of spousal maintenance by improperly imputing income to him and improperly considering testimony regarding his income. In addition, Jerry argues the court incorrectly considered marital misconduct when determining the length and amount of spousal maintenance. Finally, he contends the court asked too many questions of witnesses at trial.

¶7 We review an award of spousal maintenance for an abuse of discretion. *Cullum v. Cullum*, 215 Ariz. 352, ¶ 9, 160 P.3d 231, 233 (App. 2007). We view the evidence in the light most favorable to sustaining Iris's spousal maintenance award and will affirm if

there is any reasonable evidence to support it. *See Leathers v. Leathers*, 216 Ariz. 374, ¶ 9, 166 P.3d 929, 931 (App. 2007).

Duration of Spousal Maintenance

¶8 The amount and duration of spousal maintenance are determined with reference to the factors found in A.R.S. § 25-319(B). *See Leathers*, 216 Ariz. 374, ¶ 10, 166 P.3d at 932. These factors include the parties' standard of living during the marriage; the duration of the marriage; and the age, employment history, earning ability, and physical and emotional condition of the spouse seeking maintenance. § 25-319(B)(1), (2), (3).[1] The court's findings

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[1]Section 25-319(B) lists, in part:

> 1. The standard of living established during the marriage.
> 2. The duration of the marriage.
> 3. The age, employment history, earning ability and physical and emotional condition of the spouse seeking maintenance.
> 4. The ability of the spouse from whom maintenance is sought to meet that spouse's needs while meeting those of the spouse seeking maintenance.
> 5. The comparative financial resources of the spouses, including their comparative earning abilities in the labor market.
> 6. The contribution of the spouse seeking maintenance to the earning ability of the other spouse.
> 7. The extent to which the spouse seeking maintenance has reduced that spouse's income or career opportunities for the benefit of the other spouse.
> . . . .
> 9. The financial resources of the party seeking maintenance, including marital property apportioned to that spouse, and that spouse's ability to meet that spouse's own needs independently.
> 10. The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find

in the decree of dissolution demonstrate it considered the factors in § 25-319(B) in reaching its determination.

¶9 The trial court did not abuse its discretion in ordering spousal maintenance to last indefinitely under the circumstances of this case, which include Iris's physical and emotional health, her long tenure as a homemaker, and additional statutory factors under § 25-319(B). Although one purpose of spousal maintenance "is to aid one's ex-spouse for a limited time period while he or she achieves financial independence," the trial court "retains the discretion . . . to award indefinite maintenance when it appears 'that independence is unlikely to be achieved.'" *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 24, 972 P.2d 676, 682 (App. 1998), *quoting Rainwater v. Rainwater*, 177 Ariz. 500, 503, 869 P.2d 176, 179 (App. 1993); *see also, e.g.*, *Leathers*, 216 Ariz. 374, ¶¶ 2-3, 12, 166 P.3d at 931-32 (affirming indefinite award of spousal maintenance where wife was over sixty, had been homemaker during marriage, and had had a major stroke five years before trial); *Schroeder v. Schroeder*, 161 Ariz. 316, 323, 778 P.2d 1212, 1219 (1989) (affirming modified award of indefinite maintenance to spouse who was ill and unable to sustain meaningful employment).[2]

> appropriate employment and whether such education or training is readily available.
>
> 11. Excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common.. . . .

[2]Because the statute specifically directs the court to take into consideration Iris's "physical and emotional condition" and "earning ability," *see* § 25-319(B)(3), we reject Jerry's argument that the court abused its discretion because "[t]he word 'disability' does not

¶10 Moreover, should Iris's disabilities improve or should she otherwise be able to obtain employment, Jerry can petition the court to modify the maintenance award. *See Cullum*, 215 Ariz. 352, ¶ 23, 160 P.3d at 236 ("Awards of spousal maintenance may be modified upon a showing of changed circumstances that are substantial and continual."); *see also Gutierrez*, 193 Ariz. 343, ¶ 23, 972 P.2d at 682 (explaining husband could seek modification of spousal award if wife secured higher-paying position); *Rainwater*, 177 Ariz. at 504, 869 P.2d at 180 ("Because maintenance awards are modifiable, an award of maintenance until death or remarriage does not lock long-term maintenance irrefutably into place."). Significantly, "[t]he trial court has the discretion to place the burden of proving changed circumstances on either party." *Gutierrez*, 193 Ariz. 343, ¶ 23, 972 P.2d at 682; *see also Rainwater*, 177 Ariz. at 504, 869 P.2d at 180 (indefinite maintenance award "places the burden on the paying spouse to prove a later change in circumstances sufficiently substantial to warrant shortening the duration of the award," while a fixed-term award "places the burden on the receiving spouse to prove a change in circumstances sufficiently substantial to warrant extending the award"). Accordingly, we likewise reject Jerry's argument that "the burden should have been on [Iris] to present evidence as to the amount of time she would need to correct her medical problems and to acquire sufficient education or training to find appropriate employment."[3]

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appear in the statute at all."

[3]Jerry also argues the trial court should have considered "the justifiable expectations of the parties" when determining the duration of spousal maintenance, citing *Schroeder v. Schroeder*, 161 Ariz. 316, 778 P.2d 1212 (1989). But *Schroeder* is inapposite. There, the

Amount of Spousal Maintenance

¶11 Jerry also contends the trial court abused its discretion in determining the amount of spousal maintenance because it improperly imputed income to him and improperly considered testimony relating to his income. The court made numerous findings regarding Worthy Services, including its gross sales from parts and labor, Jerry's stated earnings, Jerry's testimony that he billed an average of twenty labor hours per week during his slow months, and his "evasive" testimony regarding the average number of hours he worked during his good and average months "despite the fact that he has worked for himself since 1992." The court also noted that one witness testified she and her husband had had a conversation with the parties in which Jerry had "talked about different ways to hide income." Based on the evidence and testimony presented, the court calculated that Jerry was working an average of only 17.2 hours a week, excluding travel time.

¶12 The court further determined that Jerry apparently "is not working to his full capacities, as he reports earnings for an average work week at even less than his reportedly slow months." Accordingly, the court concluded:

> Either one of two situations is occurring with [Jerry]. One, he is not working up to his capacity or two, he is concealing and not reporting his true earnings. Either situation justifies the

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wife sought to extend a prior award of spousal maintenance, and our supreme court considered "the justifiable expectations of the parties" as one factor in its determination whether the earlier award was modifiable. *Id.* at 317, 320-22, 778 P.2d at 1213, 1216-18. Contrary to Jerry's assertion, *Schroeder* does not stand for the proposition that the "justifiable expectations of the parties" *during the marriage* are to be taken into account when the court makes its *initial* award of spousal maintenance.

> Court's imputation to [Jerry] of full-time work at 30 labor hours per week that he would charge [at] $65.00 per hour.

The trial court calculated this would amount to a gross monthly income of $8,125 ("$65 per hour x 30 hours per week x 50 weeks per year divided by 12 months per year"). The court explained that its finding that Jerry was "not working to capacity and/or not reporting his true income" was supported by testimony that Jerry was typically gone from the home all day, six days a week, presumably to work, and that Iris had discovered a history of significant cash withdrawals by Jerry at adult entertainment establishments.

¶13 Although Jerry does not directly challenge these findings on appeal, he claims they are speculative and not supported by the evidence because his tax returns reflect a lower income, there was "a lack of evidence demonstrating that any money had been hidden or concealed," and the business evaluator testified "that [Jerry]'s records seem consistent." Jerry further contends the trial court was required to evaluate the parties' financial obligations using "whatever income is being earned," and"[t]here is no authority for the position that the Court should speculate as to what the income of a person ought to be in determining a spousal maintenance award."

¶14 The amount of income the trial court attributed to Jerry is supported by the record, including Jerry's testimony regarding the amount he charges per hour, how he charges customers for parts, and how many hours per week he averages during slow months. *Cf. Leathers*, 216 Ariz. 374, ¶¶ 11, 13, 166 P.3d at 932 (reversing trial court's spousal maintenance award where income attributed to self-employed husband not supported by record). Although the court heard conflicting evidence, nothing in the record compels the

conclusion that its findings were clearly erroneous. *See* Ariz. R. Fam. Law P. 82(A) ("Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."); *Hrudka v. Hrudka*, 186 Ariz. 84, 91, 919 P.2d 179, 186 (App. 1995) (appellate courts defer to trial court's factual findings unless clearly erroneous or unsupported by any credible evidence). Moreover, Jerry's argument that the court was required to "evaluate how each party will meet his or her financial obligations with whatever income is being earned" is incorrect; the court was required to consider Jerry's "earning abilit[y]" when fashioning its award of spousal maintenance. *See* § 25-319(B)(5); *see also Leathers*, 216 Ariz. 374, ¶ 10, 166 P.3d at 932 (explaining "amount and duration of spousal maintenance" determined using § 25-319(B) factors, including "employment history and earning ability"); *Shaughnessy v. Shaughnessy*, 164 Ariz. 449, 451, 793 P.2d 1116, 1118 (App. 1990) ("Ability to pay spousal maintenance is to be determined by earning capacity rather than the amount of voluntarily reduced income."), *abrogated in part on other grounds by In re Marriage of Zale*, 193 Ariz. 246, 972 P.2d 230 (1999). Accordingly, there is no basis on which to conclude the court abused its discretion in determining the amount of the spousal maintenance award.

¶15 Jerry also contests the amount of spousal maintenance on the ground the trial court improperly received testimony from Jackie Malott, a witness who was not disclosed prior to trial as required by Rules 49(F) (lay witnesses) and (G) (expert witnesses), Ariz. R. Fam. Law P. Jerry claims the court improperly "imputed what he thought [Jerry] should be or could be earning as a mechanic based upon the testimony offered by Ms. Mal[]ott as to

what her husband earned on weekends." It appears this witness was not timely disclosed by Iris, who was representing herself. However, we find no reversible error. The record is clear that Malott testified on this issue not as an expert, as Jerry contends, but rather based on her personal knowledge of her husband's income from his side job as a mechanic. And, even assuming this testimony was not properly admitted, its admission was harmless because the record reflects the court calculated Jerry's imputed income based on the business records of Worthy Services and on Jerry's work habits—evidence obtained from Jerry, his business evaluator, and Iris. Because there is a sufficient basis to sustain the amount of the spousal maintenance award in the absence of the contested testimony, we find no ground for reversal. *See Leathers*, 216 Ariz. 374, ¶ 9, 166 P.3d at 931 (appellate courts will affirm spousal maintenance award if supported by any reasonable evidence).

Marital Misconduct

¶16 We next address Jerry's argument that the trial court abused its discretion by considering marital misconduct when calculating the amount and duration of spousal maintenance. Jerry asserts the spousal maintenance award "clearly reflects the Court's sympathy to [Iris] and its disdain of [Jerry]." He further maintains the court "disregarded all evidence of [Jerry's] business records as to his earnings" and "believed that [Jerry] was either lazy or lying and should be punished accordingly."

¶17 As set forth above, the trial court made findings concerning Jerry's earning ability based on the evidence and testimony presented at the dissolution hearing. If the court did not find some of Jerry's testimony credible, that does not mean it based its decision on

"marital misconduct." Moreover, if the court found Jerry had misrepresented his income, it was required to take that finding into account because "destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common" is one of the factors to be considered when awarding spousal maintenance. *See* § 25-319(B)(11); *Thomas v. Thomas*, 142 Ariz. 386, 392, 690 P.2d 105, 111 (App. 1984) (trial court properly considered husband's misrepresentations about income in determining spousal maintenance award). Accordingly, we again conclude Jerry has demonstrated no abuse of discretion in the court's award of spousal maintenance.

Trial Court's Questioning of Witnesses

¶18 Jerry lastly argues that the trial court's ability to hear and decide the case was "impacted by the Court's extensive questioning of the parties and witnesses." Jerry cites no authority that any such "impact" would constitute error, let alone be a basis for reversal. Indeed, it is well settled "the trial judge is not a mere moderator, but has active duties to perform without partiality to see that truth is developed, and in his discretion he may ask questions to elicit the material evidence." *State v. Mendez*, 2 Ariz. App. 77, 79, 406 P.2d 427, 429 (1965); *see also* Ariz. R. Evid. 614(b) (permitting court to question witnesses); *State v. Schackart*, 190 Ariz. 238, 256, 947 P.2d 315, 333 (1997) ("A court . . . may interrogate witnesses as part of its duty to see that the truth is developed."). Here the record makes clear that the court appropriately asked questions "to see that the truth [was] developed." *Shackart*, 190 Ariz. at 256, 947 P.2d at 333. To the extent Jerry may be implying the court was biased against him, trial judges are presumed to be free from bias, *see*

7State v. Henry, 189 Ariz. 542, 546, 944 P.2d 57, 61 (1997), and the judge's questioning in this case does not show otherwise. Accordingly, we discern no error or abuse of the court's discretion.

Disposition

¶19 For the reasons set forth above, we affirm.

PHILIP G. ESPINOSA, Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge